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## COSTS IN PUBLIC INTEREST LITIGATION: WHOSE POCKET SHOULD BE PICKED?

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*In Hong Kong, the development of public interest litigation faces mounting difficulties due to the lack of means to secure funding to finance judicial review applications. While activists and non-governmental organizations are anxious to test the constitutionality of legal provisions and the legality of alleged wrongful acts by the public authorities in order to pursue their causes, they are, as depicted by Hartmann J, “placing [their] neck[s] beneath the guillotine of costs” in the process as they have to bear the uncertain risks of the respondent public authority’s legal costs if they do not succeed in the challenge. This article will discuss the funding system and the costs jurisprudence of public interest litigation in Hong Kong. It will seek to argue for an expansion of the funding regime for public interest litigation. In light of the public benefits arising from public interest litigation in the elucidation of public law, promotion of deliberative democracy and good administration, the court should adequately reflect such benefits in the cost allocation of public interest cases. Costs discretion should be exercised in a flexible and purposive manner, with due regard to access to justice concern, so that the future development of public interest litigation will not be unnecessarily stifled.*

### Introduction

In Hong Kong, the development of public interest litigation faces mounting difficulties due to the lack of means to secure funding to finance judicial review applications. While activists and non-governmental organizations are anxious to test the constitutionality of legal provisions and the legality of alleged wrongful acts by the public authorities in order to pursue their causes, they are, as depicted by Hartmann J, “placing [their] neck[s] beneath the guillotine of costs” in the process as they have to bear the uncertain risks of the respondent public authority’s legal costs if they do not succeed in the challenge.<sup>1</sup> The court, while recognising the difficulty of public interest litigants, is careful to guard the public purse so that “public interest” will not

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<sup>1</sup> *Chan Wai Yip Albert v Secretary for Justice*, unrep. HCAL 36 of 2005 (19 May 2005) (Ruling as to Costs).

become a pass for drawing money from the taxpayers to litigate. In *Chu Hoi Dick v Secretary for Home Affairs (No 2)* the court discussed in detail the circumstances under which it will depart from the usual order of costs to follow the event, whereby unsuccessful applicants will not be ordered to compensate the legal costs of the other party.<sup>2</sup> This article will discuss the funding system and the costs jurisprudence of public interest litigation in Hong Kong. It will seek to argue for an expansion of the funding regime for public interest litigation. In light of the public benefits arising from public interest litigation in the elucidation of public law, promotion of deliberative democracy and good administration, the court should adequately reflect such benefits in the cost allocation of public interest cases. Costs discretion should be exercised in a flexible and purposive manner, with due regard to access to justice concerns, so that the future development of public interest litigation will not be unnecessarily stifled.

## 1. The Funding of Public Interest Litigation in Hong Kong

At present, the main source of funding for public interest litigants are legal aid and private finance.

Legal aid for civil proceedings is currently available for persons whose financial resources do not exceed HK\$175,800, whereas the supplementary legal aid scheme (in which the recipient is required to pay a contribution to the Supplementary Legal Aid Fund) is available for persons whose financial resources are between HK\$175,800 and HK\$488,400.<sup>3</sup> The eligibility limit is low, and non-governmental organizations (NGOs) and charities are not eligible to legal aid. Section 5AA gives the Director of Legal Aid a discretionary power to waive the limit of financial resources under the legal aid scheme if the proceeding has reasonable grounds and concerns a breach of the Hong Kong Bill of Rights Ordinance (Cap 383) or an inconsistency with the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong.<sup>4</sup> The discretion is given as a matter of human rights policy, though according to government data it was infrequently exercised. One case of legal aid was offered under s 5AA of the Legal Aid Ordinance in 2001, none in 2002 and one in 2003 respectively.<sup>5</sup> The provision does not include litigation concerning the Basic Law or other

<sup>2</sup> [2007] 4 H.K.C. 428 (Ruling on Costs).

<sup>3</sup> Legal Aid Ordinance (Cap 91), ss 5 & 5A. According to s 2A of the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap 91B) ("the Regulations"), "financial resources" of an aided person shall be assessed by multiplying that person's monthly disposable income by 12 and adding his disposable capital to that sum. On the rules computing income and disposable capital, see Sch 1 and 2 of the Regulations.

<sup>4</sup> Legal Aid Ordinance, s 5AA.

<sup>5</sup> LC Paper No. CB(2)1412/03-04(01). More up-to-date information is not publicly available.

international conventions applicable to Hong Kong, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The restrictions of legal aid to individuals have produced the peculiar phenomenon of NGOs and pressure groups engineering applicants with no particular interests in the litigation but who would be qualified under the current legal aid scheme to put forward “test cases”. This does not reflect the true applicant and may place difficulty to the court in relation to the standing requirement.<sup>6</sup> The court has unnecessarily stretched the limit of standing in order to accommodate these public interest cases.<sup>7</sup> For other activists and NGOs that mount judicial review applications with their own resources, they either rely on pro bono legal representation, or finance the public interest litigation out of their own pockets or through fund-raising. The current state of affairs is undesirable as the lack of funding may stifle the development of public interest litigation even if the door of judicial review is wide open to the public.

At present, conditional fee arrangement in civil cases is not allowed in Hong Kong.<sup>8</sup> The Law Reform Commission in its Report on Conditional Fees recommended that, due to the lack of support from the insurance industry to provide insurance at an affordable premium and on a long term basis to cover the opponent’s legal costs should the legal action fail, it is not appropriate to introduce conditional fees in Hong Kong.<sup>9</sup> Judicial review applicants are not able to make use of the “no win, no fee” arrangement to reduce the costs risks of public interest litigation, unlike some other common law jurisdictions such as the UK and Australia.

## 2. Development of Public Interest Costs Case Law

While costs are in the discretion of the court, the usual costs order is costs to follow the event.<sup>10</sup> The rationale is that costs are awarded to

<sup>6</sup> See Po Jen Yap, “Understanding Public Interest Litigation in Hong Kong” (2008) 37 C.L.W.R. 257.

<sup>7</sup> For example, in *Lo Siu Lan v Hong Kong Housing Authority* [2005] 3 H.K.L.R.D. 257, the applicant was a 67-year-old pensioner without much interests or involvement in the controversy before the judicial review application was mounted.

<sup>8</sup> Halsbury’s Laws of Hong Kong, Vol 17, para 240.125.

<sup>9</sup> The Law Reform Commission of Hong Kong, Report on Conditional Fees, July 2007, available at [http://www.hkreform.gov.hk/en/docs/rconditional\\_e.pdf](http://www.hkreform.gov.hk/en/docs/rconditional_e.pdf). Though the Law Reform Commission rejected the feasibility of introducing conditional fees in Hong Kong, it made some alternative recommendations on improving access to justice, including the setting up of a privately-run conditional legal aid fund (yet it did not propose to include judicial review as the type of cases to be covered by the fund), and the expansion of the Supplementary Legal Aid Scheme by raising the financial eligibility limits and increasing the types of cases covered.

<sup>10</sup> Rules of the High Court (Cap 4A), O 62 r 3: “If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any party of the costs.”

compensate the successful party. When a public interest party succeeds in a judicial review application, he will normally be awarded costs on a party to party basis.<sup>11</sup> Normal party to party costs mean public interest litigants will have to bear about one-third of their legal costs, which may still be a substantial figure. Exceptionally, as in *Town Planning Board v Society for Protection of the Harbour Ltd (No 2)*,<sup>12</sup> the court exercised its discretion to award a more generous indemnity costs order to the successful public interest litigant.<sup>13</sup> The grounds on which the CFA relied on in making such an order are as follows:

“The fact that proceedings are commenced to vindicate the public interest, more particularly to protect a public asset which is a central element in Hong Kong’s heritage, rather than to assert or enforce some private right or interest, is plainly relevant to the exercise of the discretion. Also relevant is the fact that, but for the commencement of the proceedings by the Society, the public interest in securing compliance with the law would not have prevailed and resulted in the resolution of fundamental legal issues. Likewise relevant are the manifest public importance of the case (the protection of the Harbour) and the Society’s limited finances dependent as they are on public donations.”

The court was of the view that, the existence of the above factors indicated that the case possessed special and unusual features that warranted the grant of an indemnity costs order.

Where a public interest party does not succeed in a judicial review application, the court has, from time to time, declared that there shall be no order as to costs to the unsuccessful applicants of judicial review on the ground that the matter litigated was of public interest. These include the recent high profile cases concerning the constitutionality of legislation which purported to reduce public officer’s pay following the Asian economic downturn;<sup>14</sup> the legality of the Housing Authority in disposing retail and car park facilities within its housing estates to a unit trust to be listed in the Hong Kong Stock Exchange;<sup>15</sup> and the challenge alleging that the statutory scheme regulating public procession violated the right

<sup>11</sup> Rules of the High Court (Cap 4A), O 62, r 28(2).

<sup>12</sup> [2004] 2 H.K.L.R.D. 95.

<sup>13</sup> Rules of the High Court (Cap 4A), O 62, r 28(3).

<sup>14</sup> *Secretary of Justice v Lau Kwok Fai* [2005] 3 H.K.L.R.D. 88 at para 86, Sir Anthony Mason NPJ simply reasoned that “[i]n view of the desirability in the public interest of clarifying the important issues in these cases, I consider it appropriate that there should be no order as to costs in relation to the proceedings in this Court and in the courts below so that each party will bear its or his own costs.”

<sup>15</sup> *Lo Siu Lan*, n 7 above; [2005] HKEC 279 (CA) (Judgment on Costs); [2005] HKEC 1345 (CFA) (Judgment on Costs).

to peaceful assembly.<sup>16</sup> In the recent case of *Leung Kwok Hung v President of Legislative Council of HKSAR*,<sup>17</sup> which concerns the constitutionality of the Legislative Council rule that precluded a Legislative Council member from proposing an amendment to bill which has a charging effect on the revenue at the committee stage, the court stated that, if the public law litigation is not for the private gain of the applicant, but to clarify the law in respect of a matter of public importance, then the court may exercise its discretion by not ordering the unsuccessful applicant to pay the legal costs of the respondent. This has been regarded as costs incidental to good administration.<sup>18</sup> In this case, Hartmann J was of the view that the applicant's claim, though unsuccessful, was an arguable claim and that the applicant did not institute the proceeding for private gain. The judicial review had gone a long way in resolving difference in interpretation of the Basic Law and thus was instituted to advance the public interest.<sup>19</sup> Therefore he decided it was appropriate to make no order as to costs.

*Chu Hoi Dick v Secretary for Home Affairs (No 2)*<sup>20</sup>

*Chu Hoi Dick (No 2)* was the decision in which the court reviewed in detail the costs jurisprudence of public interest judicial review and laid down the general principles regarding costs in public interest litigation.

In this case the applicants challenged the decision of the Secretary for Home Affairs refusing to declare the Queen's Pier (a structure regarded by many Hong Kong citizens as memorable and of historic value) a monument under s 3 of the Antiquities and Monuments Ordinance (Cap 53). The application was dismissed and a hearing was held on the question of costs. In the ruling on costs, Lam J relied on the judgment of Kirby J in *Oshlack v Richmond River Council*<sup>21</sup> in the High Court of Australia on public interest costs orders to formulate the following criteria in deciding whether a piece of litigation was brought for public interest:<sup>22</sup>

- “(a) A litigant has properly brought proceedings to seek guidance from the court on a point of general public importance so that the litigation is for the benefit of the community as a whole to warrant the costs of the

<sup>16</sup> *Leung Kwok Hung and Anor v HKSAR* [2005] 3 H.K.L.R.D. 164; [2005] HKEC 1534 (Judgment on Costs). Chief Justice Li stated that the court will make no order as to costs between the appellants and the respondent, “having regard to the public interest in the legal issues arising in this appeal”.

<sup>17</sup> [2007] HKEC 788.

<sup>18</sup> *Ibid.*, at paras 20, 22.

<sup>19</sup> *Leung Kwok Hung*, n 17 above, at para 28.

<sup>20</sup> *Chu Hoi Dick (No 2)*, n 2 above.

<sup>21</sup> [1998] HCA 83.

<sup>22</sup> *Chu Hoi Dick (No 2)*, n 2 above, at para 31.

litigation be borne by the public purse as costs incidental to good public administration;

- (b) The judicial decision has contributed to the proper understanding of the law in question;
- (c) The litigant has no private gain in the outcome.”

The court mentioned other relevant factors including the conduct of the litigants in the proceedings in determining the costs order. On the facts of the case, the applicants failed to satisfy (a) and (b) of the criteria. They were ordered to pay the respondent’s costs.

This case provides a clear and principled approach to awarding costs in public interest litigation, the application of which, however, needs to avoid an over-restrictive interpretation.

*a. The Proper Role of the Court*

The court made it clear that public interest litigation cannot be used as a blanket immunity to costs liability in judicial review cases.<sup>23</sup> Therefore it is important to identify what are the matters that deserve using taxpayers’ money to litigate. “Properly brought proceedings” under the first criterion means that the court needs to have regard to “the proper role of the court in judicial review”. Lam J reiterated that “the court is not the forum for debating the political or social judgment embodied in an administrative decision.”<sup>24</sup> Only when the judicial review is raising a point of law that guidance from the court should be sought will it justify using the public purse to fund the litigation.<sup>25</sup>

Certainly the court is concerned only with the legality of administrative decisions. However, this does not mean that when political or social issues are embodied in legal questions the court should then shield away by exercising excessive self-restraint. The traditional approach of the court has gradually been challenged in other common law jurisdictions like the UK, Australia and Canada, where courts have increasingly been used as an additional forum for protest by public interest groups in democratic societies which value the freedom of speech.<sup>26</sup> As David Feldman pointed out, so long as judges do not act as a surrogate legislature, and are taking merely a secondary role to oversee the reasoning of the primary actors, public interest litigation can actually help to promote participatory democracy and public scrutiny of the

<sup>23</sup> *Chu Hoi Dick (No 2)*, n 2 above, at para 12.

<sup>24</sup> *Ibid.*, n 2 above, at paras 21, 22.

<sup>25</sup> *Ibid.*, n 2 above, at para 19.

<sup>26</sup> Jules Lobel, “Courts as Forums for Protest” (2004) 52 UCLA L. Rev. 477.

government.<sup>27</sup> It is an opportunity for a trialogue between the government, the court and the citizens.<sup>28</sup> Public interest litigation is a valuable platform for deliberation with jurisprudential insights which the political arena may not always be apt to provide.<sup>29</sup> Therefore funding should be made available in appropriate cases to facilitate this deliberation process through public interest litigation.

*b. The General Public Importance Test*

Under the first criterion, Lam J considered that only a point of law which is of “general public importance such that litigation benefits the community as a whole” would be qualified for a departure from an adverse costs order.<sup>30</sup>

This definition does not draw the line based on the nature or type of litigation. On the surface, the notion of the interest of “the community as a whole” seems to depend on the number of people that is likely to be affected by the decision. If so it will be most beneficial to environmental claims, because the environment is a shared or collective asset, and damage to the environment, like the Victoria Harbour, is likely to affect the whole population and is an issue of general public importance, such litigation would be most likely to benefit “the community as a whole”. However, many issues that are of general public importance may only benefit a sector of the community instead of the community as a whole, eg public interest litigation to vindicate minority rights. A major objective of public interest litigation is for the aggrieved and disadvantaged groups within the society, whose rights are otherwise under-represented in the democratic process, to vindicate their legal entitlements. The result of the litigation is in the public interest if it balances the interests of the disadvantaged and the rest of the community and creates a fair outcome. Therefore benefiting “the community as a whole” needs to be interpreted broadly so as to include litigation the issues of which only directly benefit a sector, albeit a small sector, of the community. Understandably, the government cannot fund all litigation pursued in the name of the public interest; however, if “benefiting the community as a whole” is construed too narrowly, it will become a huge barrier for public interest litigants to claim protection from an adverse costs order. As suggested by the Report of the Working Group on

<sup>27</sup> David Feldman, “Public Interest Litigation and Constitutional Theory in Comparative Perspective” (1992) 55 MLR 44.

<sup>28</sup> Dennis Davis, “Socio-Economic Rights in South Africa: The Record After Ten Years” (2004) 2 N.Z.J. Pub. & Int’l L. 47.

<sup>29</sup> Karen Kong, “Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?” (2009) 28 C.J.Q. 327 at 330.

<sup>30</sup> *Chu Hoi Dick (No 2)*, n 2 above, at para 28.



Facilitating Public Interest Litigation, the definition of a public interest case should be given a “broad, purposive interpretation. The definition should not be allowed to become unduly restrictive.”<sup>31</sup> Therefore a better criterion would seem to include sectional public interests. This is supported by the UK case of *R (on the application of Compton) v Wiltshire Primary Care Trust* concerning protective costs order, in which Smith L.J. stated that the criterion of “general public importance” does not mean that only issues of national importance will qualify.<sup>32</sup> A case which only directly affect a small group of people may raise issues of general public importance, where a much larger section of the public may be indirectly affected by the outcome.

Further, it would be a mistake if the court considers high profile cases as equivalent to issues of wide public importance. Issues which are of interest to the public are not necessarily in the public interest.<sup>33</sup>

Though the criterion does not seek to classify public interest litigation that would qualify for a departure from a usual costs order based on the type or nature of litigation, it is proposed that, if the public interest litigation is to challenge a legal point or to pursue some rights enshrined in the Basic Law, the Bill of Rights, ICCPR or ICESCR, with potential significant implications on the public generally or to a section of the public, particularly the vulnerable groups, it should be more generously construed as a matter of general public importance, though this list is not exhaustive.

### c. Proximity Requirement

In applying the first criterion to the facts of *Chu Hoi Dick (No 2)*, the court distinguished between the character of the application and the motive underlying the challenge. It required that the point to be decided must be of public importance, not only being a step towards achieving the ultimate goal of the applicant, and in this case, the preservation of the Queen’s Pier *in situ*.<sup>34</sup> The court had added an additional “proximity

<sup>31</sup> Liberty, “Litigating the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation”, July 2006 at paras 75–77, available at <http://www.liberty-human-rights.org.uk/publications/6-reports/litigating-the-public-interest.pdf>. After much deliberation, the Working Group came up with the following definition of a public interest case for the purpose of a protective costs order: “(i) the issues raised are ones of general public importance, and (ii) the public interest requires that those issues should be resolved.” The Working Group emphasised the need for a definition which is “workable and sufficiently flexible”. Though the definition is made in the context of a protective costs order, it is submitted that the same approach should be applied to identifying public interest cases for the purpose of a departure from an adverse costs order.

<sup>32</sup> [2009] 1 All E.R. 978.

<sup>33</sup> Pascoe Pleasence and Sarah Maclean, “Defining The Public Interest”, London Legal Aid Board Research Unit, 1998, p 17, available at [http://www.lsrc.org.uk/publications/defining\\_the\\_public\\_interest.PDF](http://www.lsrc.org.uk/publications/defining_the_public_interest.PDF).

<sup>34</sup> *Chu Hoi Dick (No 2)*, n 2 above, at para 34.

requirement” here. The court focused narrowly on the legal point in issue, ie the decision of the authority not to declare the Queen’s Pier a monument, and required that such a point, being resolved, must result in the resolution of a matter of general public importance.

The court considered that, even if the decision challenged was held unlawful, it would only be remitted to the public authority for re-assessment, which would not necessarily achieve the wider public objective that the applicant contemplated.<sup>35</sup> The decision challenged “was many steps remote from the decision to preserve the Queen’s Pier *in situ*.”<sup>36</sup>

If that is the case, the proximity requirement will depend very much on the decision making mechanisms as laid down in the legislation or government policies. A number of cases alleging abuse of discretion may be disqualified from a public interest costs order if all that the court will do in these cases is to quash the decision and leave the matter to be reconsidered by the public authority under a multi-layered decision making system.

Further, the additional proximity requirement, if construed restrictively, somehow goes against the essence of public interest litigation, ie to use litigation as a means to change public policy. The ultimate objective may often be a few steps away from the issues being litigated. For example, in *Society for Protection of the Harbour Ltd v Secretary for Justice (on behalf of Secretary for Transport and Housing)*,<sup>37</sup> the applicant sought a declaration that the proposed temporary reclamation of part of the foreshore of the Victoria Harbour fell within the ambit of the Protection of the Harbour Ordinance (Cap 531) and that the presumption against reclamation applied. The judgment could only serve to require the Secretary for Housing and Transport to re-decide the issue, but there is no guarantee that, having taken into account the “overriding public need” test developed by the court, the government will necessarily reach a different decision, though such decision may again be challenged on the ground of *Wednesbury* unreasonableness.<sup>38</sup>

It is proposed that the first criterion should be satisfied if the decision challenged is an “essential” step towards resolving the issue of general public importance, even though it may not be the “sufficient” step. In *Chu Hoi Dick (No 2)*, seeking a certiorari of the decision of the public authority is an essential step towards the preservation of the Queen’s Pier

<sup>35</sup> *Chu Hoi Dick (No 2)*, n 2 above, at para 36.

<sup>36</sup> *Ibid.*, n 2 above, at para 39.

<sup>37</sup> [2008] 4 H.K.L.R.D. 417. The applicant won in this case. But the analysis above can be used to illustrate the difficulty of obtaining a public interest costs order if the applicant did not succeed in this judicial review application.

<sup>38</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] KB 223.

*in situ*, though the certiorari itself is insufficient. Thus, the first criterion should have been met.

*d. Litigant has No Private Gain in the Outcome*

The public/private divide has always been problematic.<sup>39</sup> *Chu Choi Dick* (No 2) required the applicant to have no private interest in the outcome of the litigation. This would mostly benefit applicants which are charities, NGOs and political groups pursuing litigation on behalf of the disadvantaged. What about a test case in which an individual is chosen to put forward an application in order to be qualified for legal aid? In *Democratic Party v Secretary for Justice*,<sup>40</sup> the court acknowledged counsel's submission that, in almost all cases an applicant who has *locus standi* must have sufficient interest in the case, ie he must have some private interests either by way of seeking a gain or preventing a loss. The public/private divide is not a strict demarcation but a matter of degree.<sup>41</sup> The court defined the test more precisely, in that the greater public interest must be "pivotal" instead of merely "incidental" to the judicial review application.<sup>42</sup> As Hartmann J stated, "I return to what I believe is determinative in this case; namely, that this litigation, while it may have been of some benefit to the community as a whole, arose out of a determination on the part of the applicant to protect its own interests."<sup>43</sup> Hartmann J refused to grant a public interest costs order.

*Democratic Party* is correct and does show a better classification than the strict public/private divide. Judicial review applications with the main purpose for private gain should not be subsidised by public funding, as this is against the rationale that public interest litigation is used as a means to promote the public good. But those with the pivotal aim to pursue the public interest, even if they have limited private benefit, should not be disqualified from seeking a shift in the costs of promoting good administration. This is to avoid creating unnecessary barrier especially for "test case" applicants. Admittedly, the distinction between "pivotal" and "incident" interest is sometimes difficult to draw, but this is an issue on which the court is apt to exercise individual judgment in light of the subject matter of the judicial review application.

<sup>39</sup> In *R (on the application of England) v Tower Hamlets London Borough Council* [2006] EWCA Civ 1742, Carnwath LJ questioned the appropriateness or workability of the criterion of no private interests by the applicant in the outcome laid down in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 4 All E.R. 1 concerning protective costs orders.

<sup>40</sup> [2007] HKEC 2317.

<sup>41</sup> *Ibid.*, at para 18.

<sup>42</sup> *Ibid.*, at para 19.

<sup>43</sup> *Ibid.*, at para 23.

Cases since *Chu Hoi Dick (No 2)*

Subsequent case law clarifies the merits requirement for a departure from the usual costs order. In *Chan Noi Heung v The Chief Executive in Council*,<sup>44</sup> the issue was whether minimum wages should be imposed in Hong Kong. The application was unsuccessful at the Court of First Instance. The subsequent appeal “to the Court of Appeal and the application for leave to appeal to the Court of Final Appeal were” also dismissed. On the decision on costs, Chief Judge of the High Court The Hon Mr Justice Ma stated that the case lacked sufficient merits to warrant a departure from the usual order of costs to follow the event. He cited *Chu Hoi Dick (No 2)* on the issue of the proper use of public fund:<sup>45</sup>

“It cannot be in the public interest of the community as a whole to require the use of public fund to pay for the costs of the legal proceedings for resolution of an argument which has no real prospect of success.”

Hon Ma ruled that public interest litigation must be sufficiently meritorious before a departure from the usual costs rule would be considered.<sup>46</sup> The applicant’s case must have had a real prospect of success. The fact that leave had been granted did not prevent the usual costs order being made, as the court at the leave stage was only looking at the merits preliminarily. When considering costs, the court should examine the matter at the final stage. Even though the threshold test of “realistic prospect of success” as laid down in the Court of Final Appeal in *Peter Po Fun Chan v Winnie Chung*<sup>47</sup> appeared to be the same as the test laid down by Hon Ma, he clarified that they were different as they were considered at different stages of the proceeding. The granting of leave could not be considered as a weighty factor in determining whether costs should follow the event.<sup>48</sup>

It must be right that public interest challenge should have sufficient merits to deserve the use of public fund. However, the above principle risks framing too narrow a window for the usual costs order to be departed from. If one looks at the merits of a case on hindsight, it is easier to conclude that a case has no merit. Since *Peter Po Fun Chan* had already raised the standard of leave to one of “realistic prospect of success”, it is uncertain what more the court would require before a case would be regarded as having sufficient merits. This will post a huge

<sup>44</sup> [2007] HKEC 885 (CFI); [2008] HKEC 780 (CA); [2009] 3 H.K.L.R.D. 362 (Decision on Costs); [2007] HKEC 459 (CFA).

<sup>45</sup> *Chan Noi Heung (Decision on Costs)*, n 44 above, at para 10.

<sup>46</sup> *Ibid.*, at para 9.

<sup>47</sup> [2008] 1 H.K.L.R.D. 319.

<sup>48</sup> *Chan Noi Heung (Decision on Costs)*, n 44 above, at para 12.

barrier on public interest litigants to obtain costs after an unsuccessful application. It is submitted that merits should be considered by reference to the position at the commencement of the proceeding. This will leave public interest litigants with less surprise as to the risks of litigation costs at the end of the litigation once they have passed the leave stage. This approach was also adopted by Lam J in *Chu Hoi Dick (No 2)*.<sup>49</sup> Alternatively, it may be prudent for public interest litigants to consider applying for a protective costs order at the early stage of the proceeding, to avoid disappointments and the uncertain costs risks. Protective costs orders will be discussed in the following section.

### 3. Further Recommendations

To further reduce the costs barrier of public interest litigants, the following recommendations are worth considering.

#### *a. Protective Costs Order*

A Protective Costs Order (PCO) can be made at any stage of the proceedings. It is an order by which a party will not be liable for the other side's costs if he loses in the litigation, or that the liability for the other side's costs is capped at a certain amount.

The Hong Kong court has recognised its jurisdiction to grant a PCO in public interest judicial review cases in *Chan Wai Yip Albert v Secretary for Justice*.<sup>50</sup> PCO has been made in a number of landmark public interest cases in the UK, including *Campaign for Nuclear Disarmament*,<sup>51</sup> *Refugee Legal Centre*<sup>52</sup> and *Corner House*.<sup>53</sup> Lord Justice Brooke, one of the judges in *Corner House*, admitted extra-judicially that PCO is controversial, so caution must be exercised to prevent moving too far and too fast in this area.<sup>54</sup> The overriding object is to ensure that, so far as practicable, parties are on an equal footing and that the case is dealt with fairly.<sup>55</sup>

The benefits of granting PCO in public interest litigation in Hong Kong are manifold.

<sup>49</sup> *Chu Hoi Dick (No 2)*, n 2 above, at para 24.

<sup>50</sup> *Chan Wai Yip Albert*, n 1 above.

<sup>51</sup> *R (on the application of Campaign for Nuclear Disarmament) v the Prime Minister* [2002] EWHC 2712.

<sup>52</sup> *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ. 1296.

<sup>53</sup> *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 4 All E.R. 1.

<sup>54</sup> Lord Justice Brooke, "Environmental Justice: The Cost Barrier" (2006) 18 J.E.L. 341.

<sup>55</sup> *Ibid.*

First, it serves to promote the right of access to the court. PCO will be particularly useful for NGOs and pressure groups who wish to put forward a claim in the name of public interest, but are not qualified for legal aid and do not have sufficient financial resources to litigate.<sup>56</sup> PCO fills the gap in legal aid. Currently in Hong Kong, public donation for NGOs with the specific objective of litigating the public interest is not as widespread as some other common law jurisdictions like the UK, Australia or Canada.

Second, judicial review has to be made promptly without undue delay, and in any event within three months from the date when the grounds for the application first arose.<sup>57</sup> This increases the difficulty for applicants to raise sufficient fund within such a short period. PCO provides certainty to NGOs and pressure groups and allows them to be protected against the uncertain amount of costs liability in the event that they lose the litigation, and enables them to pursue a claim which they otherwise will not pursue if they are not granted a PCO.

Third, by using public funding to finance the litigation of important and deserving public law issues, the court can ensure that public interest litigation is not unnecessarily hampered. This can further the development of public law and promote the rule of law in Hong Kong. It is also in line with participatory democracy and public scrutiny of the government, which fits the model of deliberative politics.<sup>58</sup>

Particularly with the growing trend of judicialization and the increasing awareness of the rights of citizens in Hong Kong, the court should be more open to grant PCO if it is fair and just in the circumstances, in order to promote the understanding and elucidation of public law.

Certainly, the grant of PCO only protects applicants from the costs liability of the public authority in case they lose the litigation. They still have to bear their own side of the legal fees. The Canadian Supreme Court in *British Columbia (Minister of Forests) v Okanagan Indian Band* had granted an interim order which required the public authorities to pay the legal costs of the applicants irrespective of the outcome of the litigation.<sup>59</sup> This type of order was considered by the UK court in *Corner House* as outside its jurisdiction as it involved judicial legislation.<sup>60</sup> In

<sup>56</sup> Richard Clayton, "Public Interest Litigation, Costs and the Role of Legal Aid" (2006) P.L. 429.

<sup>57</sup> Rules of the High Court, O 53 r 4(1): "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

<sup>58</sup> Note 27 above.

<sup>59</sup> [2004] 1 C.N.L.R. 7 (S.C.C.). See generally, Chris Tollefson, Darlene Gilliland & Jerry DeMarco, "Towards a Costs Jurisprudence in Public Interest Litigation" (2004) 83 Can. Bar Rev. 473.

<sup>60</sup> *Corner House*, n 53 above, at para 77.

*Chan Wai Yip Albert v Secretary of Justice*, the applicant sought an order that the respondent should pay the costs for the applicant.<sup>61</sup> Hartmann J was of the view that the applicant had not made out a case to show that he should be awarded costs in his favour, as he could find no fault on the part of the respondent.<sup>62</sup> Unlike *Corner House*, Hartmann J did not consider itself to have no jurisdiction to do so. This opened a possibility for courts to grant an order requiring the costs of the public interest litigant to be borne by the other party in any event. However, this will be a big step and the court should consider the circumstances carefully and should only grant such order in exceptional cases.

i. Governing Principles for Granting PCO

In *Corner House*, the Court laid down the governing principles for granting PCO. They are similar to those in *Chu Hoi Dick (No 2)* but with some additional elements:<sup>63</sup>

- “1. A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
  - (i) the issues raised are of general public importance;
  - (ii) the public interest requires that those issues should be resolved;
  - (iii) the applicant has no private interest in the outcome of the case;
  - (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and
  - (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.”

1(i) and (iii) are similar to the criteria laid down in *Chu Hoi Dick (No 2)*. Since PCO can be applied at any stage of the proceedings, it may not be apparent whether the decision will contribute to the proper understanding of the law in question before the proceedings end. Therefore 1(ii) only requires that it is in the public interest that those issues be resolved. 1(iv) and 1(v) are tailored to assess the financial

<sup>61</sup> *Chan Wai Yip Albert*, n 1 above.

<sup>62</sup> *Chan Wai Yip Albert*, n 1 above, at para 38.

<sup>63</sup> *Corner House*, n 53 above, at para 74.

condition of the applicant in deciding whether a PCO is justified before the judicial decision is made.

In *Corner House*, the judge explained that the applicant's case needs to have a real (as opposed to fanciful) prospect of success, or that the case is properly arguable.<sup>64</sup> Since merit is to be assessed at the early stage of the proceeding, to set any higher threshold may open the floodgate for satellite litigation which is undesirable.<sup>65</sup>

Criterion 2 has been heavily criticised.<sup>66</sup> It was commented by Stein and Beagent that this criterion confused the resources of the clients and those of their lawyers.<sup>67</sup> Particularly in Hong Kong where pro bono representation is not as widespread as it is in the UK, it is less likely to have lawyers to work pro bono in public interest cases. Therefore criterion 2 should not be followed in Hong Kong.

PCO is a useful tool for public interest litigants and the court should be more ready to grant such an order having regard to all the circumstances of the case and the equitable balance between the parties in doing so. Indeed, PCO for public interest litigation in the UK was originally granted only in exceptional circumstances, but the exceptionality had been subsequently relaxed in *R (on the application of Compton) v Wiltshire Primary Care Trust*<sup>68</sup> and *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp.*<sup>69</sup> To counter-balance the interests of the defendant, the court may cap the costs to be awarded to the applicant if he succeeds in the judicial review to a modest amount to prevent extravagant spending. Further, an application for PCO is to be dealt with expeditiously by the court.<sup>70</sup> This serves to prevent satellite litigation and extra expenditure against the public interest.

#### *b. Expansion of Legal Aid*

As discussed, the financial eligibility of legal aid in Hong Kong is limited and exception to such criteria is restricted to the Bill of Rights and ICCPR issues. It is hoped that the existing regime will be expanded so that potential meritorious public interest litigants will not be turned away merely on the ground of fear of costs liability.

<sup>64</sup> *Ibid.*, at para 73.

<sup>65</sup> *Ibid.*

<sup>66</sup> Note 39 above, at para 96.

<sup>67</sup> Richard Stein and Jamie Beagent, "Protective Costs Orders" [2005] JR 206, at paras 34, 35.

<sup>68</sup> *Compton*, n 32 above.

<sup>69</sup> [2008] EWCA Civ 1209. See Adrian Zuckerman, "Protective Costs Orders – A Growing Costs-Litigation Industry" (2009) 28 C.J.Q. 161.

<sup>70</sup> *Corner House*, n 53 above, at para 79.



## Conclusion

The risks of costs liability pose a real burden on litigants who wish to pursue the public interest through judicial review. Meritorious cases, even though unsuccessful, that help to resolve issues of public importance in the society are contributing to the good administration of the government and enhancing participation in the democratic process. The court should in such circumstances depart from the usual order of costs to follow the event and exempt the applicants from bearing the litigation expenses of the respondent public authority. *Chu Hoi Dick (No 2)* laid down the test by which the court will depart from a usual costs order. It is important for the test to be applied flexibly and in a way that meets the real needs of the applicants. The court should adopt a purposive approach and an open mindset towards what constitutes public interest and public importance in our society. Further, other supporting mechanisms of access to justice, including the legal aid, should be expanded and periodically reviewed to ensure that they develop alongside growing demand. Access to justice is the key to transform the rights on paper into reality.